United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,006 259

HENRY JOHNSON,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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Washington, D. C. 20036

Counsel for Appellant
(Appointed by this Court)

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QUESTIONS PRESENTED

1. Whether the fact that a man was seen at night running from the vicinity of a doorway of a church, which doorway faces on a sidewalk used as a public thoroughfare, and, when approached by a police officer dressed in civilian clothes who noticed a bulge in his left front trouser pocket, ran away from said officer, constitutes "probable cause" to warrant the belief in the arresting officer's mind that a felony has been committed?

2. Assuming there had been "probable cause" for the initial arrest, was it not unlawful to detain the accused when it was discovered that the facts supporting said probable cause proved to be unfounded?

3. Whether an incriminating statement given by the accused in response to police questioning following an arrest based upon information insufficient to constitute probable cause and without advice regarding his constitutional rights, is inadmissible by reason of the fact that the statement constituted "fruits" of the unlawful arrest?

4. Assuming that there has been "probable cause" for the arrest and continued detention, whether incriminating statements given in response to police questioning after such an arrest are inadmissible due to the failure of the police to inform the accused of his rights both to remain silent and to have advice of counsel?

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JURISDICTIONAL STATEMENT

Appellant was tried in January 1966, in the United States District Court for the District of Columbia and convicted of carrying a dangerous weapon without a license. The Trial Court allowed his petition for leave to appeal in forma pauperis. This Court has jurisdiction over the appeal by virtue of 28 U.S.C. §1291.

STATEMENT OF THE CASE

On the evening of July 8, 1965,[1] Officers Johnson and Grabner of the Tactical Force of the Metropolitan Police Department were cruising south on Vermont Avenue, NW, in Officer Johnson's private car.[2] When they had reached a point some two-thirds the distance between N Street and Thomas Circle (See Point A, Appendix A hereto; Tr. 8-9 and

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1 / There is conflicting testimony with respect to the exact time. The police officer testified that it was 11:50PM (Tr. 9), while appellant testified that it was closer to 11:00 (PM). Since Detective McEwen did not arrive at the scene until about 11:55 (Tr. 39), the time was probably nearer 11:00PM.

2 / As is customary for police officers assigned to the Tactical Force, they were dressed in civilian clothes and were riding in a private car.

22-23),[3] Officer Johnson observed appellant "run from the doorway of the Luther Memorial Church [Appendix A, Point 1] . . . across the churchyard, west across 14th Street into the 1400 block of N Street, NW." (Tr. 10) The officers, in order to intercept appellant, drove through the alley in the rear of the 1400 block of N Street. (Tr. 10) As appellant approached the officers' car (Appendix A, Point 2), Officer Johnson emerged from the car, identified himself,[4] and told him that he wished to talk to him. (Tr. 10, 105) When approached by Officer Johnson, appellant stopped and "began to back away." (Tr. 10, 106) Officer

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3/ Since an important issue here is that of "probable cause," it is important that the Court have the clearest possible understanding of the facts and circumstances incident to the Appellant's arrest and detention. Accordingly, we have prepared and attach hereto as Appendix A, a drawing, traced from an accepted real estate atlas, which, when considered together with the testimony which appears at pages 20, et seq. of the transcript, will aid the Court in getting a picture of the setting in which the alleged crime was committed. We have included it in this brief, rather than presenting it initially at the time of oral argument, to permit Government counsel to make such comment concerning it as he may wish.

4/ Officer Johnson testified that he identified himself. (Tr. 10, 12) Appellant testified that Officer Johnson did not verbally identify himself and, although he might have presented his badge, he (Appellant) never saw it. (Tr. 105) The prosecution presented no evidence to indicate the nature of lighting at the point of interception to show that, had the badge been presented, defendant could readily have seen and recognized it.

Johnson then noticed that appellant had a bulge in his left trouser pocket which he slapped with his left hand.

In the meantime, either Officer Johnson or Officer Grabner had radioed for two other officers (Rodill and Parr). As these two police officers, also dressed in plain clothes, approached appellant from behind, appellant turned, saw them and ran between Officers Johnson and Grabner into the alley turning east in the rear of the 1400 block of N Street. (Tr. 10-11, 106-107) Officers Parr and Johnson ran after appellant who was later apprehended (Point 3 on Appendix A) at Vermont and N Street, NW, by Officers Grabner and Rodill.[5/] The officers searched appellant and found a handkerchief, cigarettes, a pair of black leather gloves and some money. (Tr. 18, 46) The officers then called Detective McEwen of the Second Precinct, who arrived sometime later.[6/] Detective

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5/ Officer Johnson, while giving chase, during which he was some ten-twelve feet from the appellant, claims to have lost sight of appellant as he went over a crest in the alley. The next time he saw him, he had already been apprehended by the other two officers.

6/ There is conflicting testimony as to the time that elapsed between the arrest of appellant and the arrival of Detective McEwen. Officer Johnson testified that it took only fifteen minutes from the time he first saw appellant and the arrival of Detective McEwen. (Tr. 19) Appellant is not certain as to the exact time, however, he estimates that it was in the neighborhood of forty minutes, since he smoked two cigarettes. (Tr. 115-116) Detective McEwen said he arrived at about 11:55PM (Tr. 39).

McEwen took appellant to the Second Precinct, where they arrived at approximately 12:15AM. The record does not indicate whether the police officers informed appellant that he was under arrest, or that they advised him of the grounds on which he was being held.[7]

Officer Johnson searched the area to see if the church had been robbed and found that it had not been broken into.[8] (Tr. 24) After Detective McEwen and appellant left for the Second Precinct, however, Officer Johnson found a .32 caliber automatic pistol on a parking lot abutting the alley through which he had chased appellant. (See Appendix A, Point 4; Tr. 11, 22, 30 and 31) Officer Johnson then called the patrol signal officer who in turn related this information to Detective McEwen. (Tr. 40-41)

Subsequent to the receipt of the information, Detective McEwen questioned appellant with respect to the

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7/ There is testimony by Detective McEwen that he thought appellant was being held on suspicion of breaking and entering the church. (Tr. 50)

8/ It appears that this was done prior to the time Detective McEwen and appellant left for the police station. See infra p. 22 n. 27 .

gun found by Officer Johnson. The record does not indicate whether prior to this interrogation, Detective McEwen informed appellant regarding his right to counsel and his right to remain silent.

At the trial Officer Johnson, Detective McEwen and Officer Parr testified for the Government. Officer Johnson testified to the events which transpired leading to the appellant's arrest and he identified the gun which he had found and which was introduced into evidence as one of the Government's exhibits. Detective McEwen testified as to certain incriminating statements made by appellant during the course of the interrogation by him. Officer Parr was presented as a rebuttal witness.

When, during the course of Detective McEwen's testimony, it became apparent that the Government would rely on the statements made to the officers, defense counsel objected "on the grounds that any statement that the . . . [appellant] may have made in this instance would have been a result of . . . [an] improper arrest." (Tr. 41) Since "[t]here was simply no probable cause to support this arrest." (Tr. 42) The Trial Judge ruled "there was probable cause under all the circumstances . . . ." (Tr. 43) and he allowed into

evidence Detective McEwen's testimony relating to "what questions and what answers, if any, the . . . [appellant] gave regarding the gun." (Tr. 43) He testified as follows:

> I asked the defendant about this gun and the defendant stated that he was on the south side of N Street in the 1200 block and he stopped at a tree-box space to urinate. He said at this time, he found this gun laying on the ground. He picked this gun up, put it in the waistband of his pants and started walking towards 14th Street and for no reason at all, the officers started chasing him. (Tr. 43)

He further testified that when the gun was shown to appellant "I asked the defendant if that was the gun that he had, and he stated, yes." (Tr. 44) This testimony was corroborated, again over defense counsel's objections, by Officer Parr. (Tr. 193-197) However, defendant's statement, contrary to the standard procedure of the Metropolitan Police Department,[9/] was not reduced to writing and signed by appellant.[10/] (Tr. 54) This incriminating statement was the only evidence linking appellant to the gun since no fingerprints of appellant were found on the gun (Tr. 34) and Officer Johnson did not see or hear appellant throw away the gun while he

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9/ Police Department Regulations, Chapter 23, Section 23.

10/ Detective McEwen, however, took some notes. (Tr. 54)

was chasing appellant. (Tr. 30-31) The Court, in its charge on voluntariness, pointed to appellant's admissions.[11] (Tr. 213)

Appellant took the stand in his own behalf and testified that he was not carrying a pistol on the night of his arrest (Tr. 63); that he did not make any statement to the police officer admitting that he had a pistol in his possession (Tr. 71); that he was running across the church lot in order to get to a bus stop on 14th Street, directly opposite the walkway discussed above (Appendix A, Point X), and that, in doing so he saw a taxi cab turn west into N Street - a one-way street going east - (Tr. 65-67), which cab he then tried to catch; that he ran away from the police officers who were in civilian clothes because he was "scared." (Tr. 68)

11/ Since the argument by counsel to the jury was not reproduced, it cannot be determined whether Government counsel argued these statements to the jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF POINTS

The Trial Judge erred in admitting into evidence incriminating statements of the appellant obtained after an arrest which was not based upon sufficient information to constitute probable cause.

Assuming there was probable cause to support appellant's arrest and continued detention, the Trial Court erred in admitting appellant's statements obtained after arrest and prior to the time he was informed of his rights to silence and to counsel.

With respect to these points, appellant desires the Court to read the following pages of the transcript: Tr. 8-129; 185-197, inclusive.

SUMMARY OF THE ARGUMENT

I. It is appellant's contention that his initial arrest was illegal since it was not based upon information sufficient to constitute "probable cause" as required by the Fourth Amendment. However, if the Court finds that there was probable cause for his initial arrest, appellant contends that it was unlawful to detain him after it was discovered that the facts supporting said probable cause proved to be

unfounded. The incriminating statements following his arrest and detention are the fruits of the police officer's unlawful action and therefore inadmissible. Thus, the Trial Court committed reversible error in admitting these statements into evidence. In consequence, appellant's conviction must be reversed and a new trial ordered.

II. If the Court finds that appellant's arrest and continued detention were supported by probable cause, it then becomes necessary for the Court to determine the applicability of the Supreme Court's decision in Escobedo v Illinois to appellant's incriminating statement given in response to police questioning. It is appellant's contention that, if his arrest and continued detention were in fact supported by probable cause, the Supreme Court's holding in Escobedo requires the police officer to inform him of his absolute constitutional right to silence and of his right to counsel before any questions were asked of him. Failure on the part of the police to advise appellant of his rights renders his confession inadmissible. Assuming that Escobedo does not require, in circumstances such as these, that confessions obtained by police through questioning of uninformed persons after arrest be excluded, appellant nevertheless contends

that this Court, in the exercise of its supervisory authority, and on the facts of this case, should hold that his incriminating statement was improperly received in evidence.

ARGUMENT

I. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE OF THE ARRESTING OFFICER'S VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT

It is appellant's contention that his initial arrest was illegal since it was not based upon information sufficient to constitute "probable cause" as required by the Fourth Amendment. However, if the Court finds that there was "probable cause" for his initial arrest, appellant contends that it was unlawful to detain him after it was discovered that the facts supporting said probable cause proved to be unfounded. The incriminating statements made by appellant following his arrest and detention are the fruits of the police officer's unlawful action and therefore inadmissible. Thus, the Trial Court committed reversible error in admitting these statements into evidence. In consequence, appellant's conviction must be reversed and a new trial ordered.

A. Appellant's Arrest was not Based Upon Information Sufficient to Constitute "Probable Cause"

It is clear that the legal standard found in the constitutional command that no warrants for either searches or arrests shall issue except "upon probable cause" is

equally applicable to arrests without warrants. Wong Sun v United States, 371 U.S. 471, 479-480 (1963); Henry v United States, 361 U.S. 98, 102 (1959); Carroll v United States, 267 U.S. 132, 155 (1925). Gatlin v United States, 117 U.S. App. D.C. 123, 326 F.2d 666, 671 n. 10 (1963); Wrightson v United States, 95 U.S. App. D.C. 390, 394, 222 F.2d 556, 559 (1955). What constitutes "probable cause" has been the subject of a myriad of decisions. From them emerge a series of basic propositions which the courts have used to test the lawfulness of the arrest. "It is basic that an arrest with or without a warrant must stand upon firmer ground than mere suspicion . . . ."[12] Wong Sun v United States, supra at 479. For an "[a]rrest on mere suspicion collides violently with the basic human right of liberty."[13] On the other hand, evidence required to establish guilt is not necessary. Brinegar v United States, 338 U.S. 160, 176, (1949). But "good faith on the part of the arresting officer is not enough." Henry v United States, supra at 102. It is "evidence which would 'warrant a man of reasonable

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12/ Even a "strong reason to suspect" has been held not adequate to support a warrant for arrest. Conner v Commonwealth (Pa.), 3 Binn 38. Cited by Mr. Justice Douglas in Henry v United States, supra at 101.

13/ Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rational and Rescue, 47 Geo. L.J. 1,22 (1958).

caution in the belief' that a felony has been committed . . . ." Wong Sun v United States, supra at 479, that is required. Stated in another way "[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been commited." Henry v United States, supra at 102. (Emphasis supplied) Thus although the question is whether "probable cause" exists, "[t]he standard is a reasonable, cautious and prudent man."[14/] The quantum of information which constitutes probable cause must be measured by the facts of the particular case and must be limited to the testimony of the arresting officer "since the answer to the question of probable cause must . . . be found in the evidence he was aware of at the time of the arrest"[15/] for "an arrest is not justified by what the subsequent search discloses."[16/] Finally, the requirement of probable cause must be "strictly enforced"[17/] otherwise it would

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14/ Bell v United States, 102 U.S. App. D.C. 383, 386, 254 F.2d 82, 85 (1957), cert. denied 358 U.S. 885 (1958).

15/ Gatlin v United States, 117 U.S. App. D.C. 123, 326 F.2d 666, 668 (1963) [Court footnotes omitted].

16/ Henry v United States, supra at 104.

17/ Henry v United States, supra at 102.

encourage "the disreputable and unconstitutional practice of arresting for investigation and interrogation."[18/]

An examination of Officer Johnson's testimony clearly indicates that "the evidence he was aware of at the time of the arrest" would not satisfy the constitutional mandate of "probable cause." Appellant's arrest was nothing more than an arrest on mere suspicion for investigation and interrogation and as such clearly inconstitutional. Gatlin v United States, supra, 326 F.2d at 670; Bowling v United States, ___ U.S. App. D.C. _____, 350 F.2d 1002 (1965).

What was Officer Johnson aware of at the time of the arrest? He saw a man running from in front of a doorway of a church, which doorway abuts a sidewalk connecting two generally parallel public sidewalks (Tr. 10, 23), and is obviously used as a short-cut between them. (Appendix A) He clearly indicated that he did not see the man opening or coming out of the church door (Tr. 17); nor did he see him

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18/ See Ford v United States, U. S. App. D. C. ____, 352 F.2d 927, 935 (1965) (Concurring Opinion, Wright). As Mr. Justice Douglas stated in Henry, supra: "Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." (361 U.S. at 104)

standing in front of the door (Tr. 18); he only saw a man running from the general direction of the church door. Dressed in civilian clothes, he then intercepted this man for questioning who, when confronted, "began to back away." Officer Johnson then noticed "a bulge" in the man's left hand trouser pocket, which the suspect slapped with his left hand, and observed that the man ran when he became aware that two other men, also in civilian clothes, were closing in on him from behind. (Tr. 10) While giving chase, he did not hear or see anything which would indicate that appellant threw away the gun which he is charged with illegally possessing. (Tr. 30-31)

Thus, in essence, there are three factors which the Court must weigh to determine "the question whether prudent men in the shoes of . . . [Officer Johnson] would have seen enough to permit them to believe that . . . [appellant] was violating or had violated the law:"[19/]

(a) a man was seen running from the general direction of a church door,

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19/ Henry v United States, supra at 102.

(b) when confronted, he was observed to have a "bulge" in his left hand trouser pocket which he slapped, and

(c) when surrounded by four police officers in civilian clothes, he started to run.

Appellant submits that a prudent man in the shoes of Officer Johnson had not seen enough to permit him to believe that appellant was violating the law. At best, it would give rise to mere "suspicion." However, an "arrest" must stand upon firmer ground than mere suspicion. Wong Sun v United States, supra at 479. There was nothing illegal in appellant's conduct. The fact that, in the past churches have been broken into, does not make every man who runs away from the vicinity of a church subject to arrest.[20] This is especially true here where the pathway on which the appellant was seen connects public sidewalks on opposite sides of the

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20/ Compare Henry v United States, supra, where the federal officers knew that an interstate shipment of whisky had been stolen; had received information which implicated one of the defendants in the contraband of interstate shipments and had seen defendants transporting some cartons in their car. There the Supreme Court held that the arresting officers did not have probable cause for the subsequent arrest even though the cartons, although they did not contain whisky, were nevertheless contraband. The Court held that "[t]he fact that packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure." 361 U.S. at 104.

block. (Tr. 23) Thus, one can reasonably infer that the pathway was being used as a short cut. Banks are held up, but this does not make every man who runs away from a bank subject to arrest. The constitutional command of "probable cause" certainly requires something more.

What other evidence was there on which this arrest was predicated - a bulge in his left hand trouser pocket. There is nothing inherently illegal about having a "bulge" in your pockets. This is an everyday occurrence. Certainly the fact that stolen goods make "bulges" in pockets does not make every man with a bulge in his pocket subject to arrest.[21/] The police must have reasonable grounds to believe that the particular "bulge" contains stolen or illegally-held property. Henry v United States, supra at 104. Officer Johnson had no such information.

Finally, Officer Johnson saw that the man, when surrounded by four police officers in civilian clothing, began to run. Thus, the question comes down to whether appellant's flight justified an inference of guilt sufficient to generate probable cause for his arrest. The Supreme

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21/ Nor does the "bulge" indicate that appellant was carrying a gun.

Court and this Court have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime.[22/] The Court in Wong Sun specifically refused to draw any inference from flight in determining probable cause. Supra at 482.[23/] This Court has recently held that a presumption of guilt cannot be drawn from flight.[24/] This is especially true here where the police officers were dressed in civilian clothes and appellant, when surrounded, had every reason to believe

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22/ In Alberty v United States, 162 U.S. 499, 511 (1896) the Supreme Court stated: "It is not universally true that a man, who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper;' since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.'" See also Hickory v United States, 160 U.S. 408 (1896); Allen v United States, 164 U.S. 492 (1896); and Starr v United States, 164 U.S. 627 (1897).

23/ See also Taglavore v United States, 291 F.2d 262, 267 (9th Cir. 1961); Cooper v United States, 94 U.S. App. D.C. 343, 218 F.2d 39, 41 (1954).

24/ Miller v United States, 120 U.S. App. D.C. 128, 320 F.2d 767 (1963).

that he was going to be attacked.[25/] Thus, in the instant case, appellant's flight from four men who were closing in on him afforded no surer an inference of guilt knowledge than did the suspect's conduct in Wong Sun in repelling an apparently unauthorized intrusion. (371 U.S. at 483)

The evidence which Officer Johnson was aware of at the time the arrest was made at Vermont and N Street did not show that an illegal act had been committed. He had seen the appellant run from a church door but subsequently learned that the church had not been broken into or entered. He saw a bulge in a trouser pocket but saw no gun or even conclusive evidence of one. Neither did he see appellant throw away a gun or even attempt to, although, while pursuing appellant in a lighted alley, he was generally no farther than ten-twelve feet from him. At the very most, all appellant could have done was to raise suspicion. But mere suspicion is not enough to support an arrest without a warrant. The officer must have some evidence which would indicate that a crime had been committed.

25/ Appellant testified that he ran because he was scared. (Tr. 68) Thus appellant's flight "is explained by terrorized innocence as well as by a sense of guilt . . ." since "people caught in a web of circumstances frequently become terror striken." Cooper v United States, 94 U.S. App. D.C. 343, 218 F.2d 39, 41 (1954).

This is not the situation where the arresting officer had prior knowledge that a crime had been committed; nor is it the situation where appellant's physical appearance fits the description of a suspect. All of appellant's acts were outwardly innocent. There was no act which the Government could point to which would indicate that a crime had been committed. The illegality of appellant's arrest becomes clear when the facts in the instant case are compared to those in Johnson v United States,[26/] where the Supreme Court held that the smell of opium coming from a closed room was not enough to support an arrest and search without a warrant.

B. Assuming That There was Probable Cause for Appellant's Arrest, the Arresting Officer Unlawfully Detained Appellant after it was Discovered that the Facts Supporting Such Probable Cause Proved to be Unfounded

It cannot be disputed that, if the facts in this case are sufficient to support an arrest without a warrant, it was on the grounds that the arresting officer had reason to believe that appellant had broken into the church. Officer Johnson so testified. (Tr. 24) It is also undisputed that Officer Johnson, after apprehending appellant, investigated to determine if indeed the church had been broken into

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26/ 333 U.S. 10 (1948).

and determined that in fact it had not. (Tr. 24) The record is also clear that his investigation took place prior to the time Detective McEwen arrived and that by the time that appellant and Detective McEwen left for the Second Precinct, the officers had determined that appellant had not broken into the church.[27/] It is appellant's contention that once this fact was discovered, his continued detention became illegal since, whatever basis the arresting officer had to support his "probable cause" for the arrest was dissipated by the subsequent discovery.

It is clear that the constitutional safeguard of "probable cause" not only applies to the initial arrest, but also requires that a person's continued detention be supported by such probable cause. It would be anomalous, indeed, if the constitutional mandate applied only to the initial arrest and left a citizen's continued detention "at the mercy

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27/ Appellant testified that after his arrest and before Detective McEwen arrived, the arresting officers "were running through the alley to check and running over to the church to see if I had did [sic] anything." (Tr. 115) This testimony is uncontroverted. In addition, Detective McEwen testified that when he took appellant to the Second Precinct, appellant was not being held in connection with the possibility that appellant had broken into the church. (Tr. 60)

of the officers' whim or caprice." Brinegar v United States, 338 U.S. 160, 176 (1949). Such a construction would collide violently with the basic human right of liberty.[28/]

In United States v Meachum,[29/] Judge Youngdahl applied the "probable cause" standard to test the legality of a person's continued arrest status. He stated:

> The import of the Fourth Amendment is that an individual may not be arrested and retained in custody without probable cause . . . .
>
> Defendant's Fourth Amendment rights were violated because he confessed at a time when no probable cause existed to justify his continued arrest status. Assuming, arguendo, that probable cause existed for defendant's arrest without a warrant on the Turner charge which was the basis of the first lineup, any such cause disappeared when Turner failed to identify defendant at that time on that charge. Thus, defendant should have been released on that charge. There was also no probable cause, from the evidence before the Court, to hold defendant on the Mallinoff charge - the basis of the second, incrimination lineup. [Emphasis supplied]

28/ This Court's admonition in Wrightson v United States, 95 U.S. App. D.C. 390, 394 , 222 F.2d 556, 560 (1955), while applying the constitutional standard of "probable cause" for the issuance of a warrant to an arrest without a warrant is equally applicable to the instant situation. Thus, "[t]o strike down all factual requirements in respect to probable cause for . . . [the continuation of an arrest] while maintaining them for . . . [the initial arrest], would be to blast one of the support columns of justice by law."

29/ 197 F. Supp. 803 (D.C. D.C. 1961) (Cited with approval in Gatlin v United States, supra, 326 F.2d at 671 n. 9).

Assuming, arguendo, that probable cause existed for appellant's arrest without a warrant on the grounds that Officer Johnson could reasonably infer that appellant had broken and entered into the church, any such cause disappeared when it was discovered that appellant had not in fact broken into the church. Nor do the facts support the contention that there was still "probable cause" to support the charge of "attempted" breaking and entering since Officer Johnson testified that he did not see appellant attempting to break in (Tr. 17); nor did he discover after inspection that the door had been forced (Tr. 24); nor did he find on appellant's person any tools which would be used to effectuate such a breaking and entering. This conclusion is buttressed by the fact, as indicated earlier, that appellant, when taken to the Second Precinct, was not being held on any charges relating to the church. Thus, the arresting officers had no grounds to continue holding appellant under arrest and his continued detention became illegal.

C. Appellant's Incriminating Statement Made in Response to Police Questioning is Inadmissible as "Fruits" of the Unlawful Arrest and Detention

Prior to the Supreme Court's decision in Wong Sun, supra, a number of federal courts had held that an arrest without probable cause did not, in itself, render a confession inadmissible in the federal courts.[30] It was felt that the fact that the confession was voluntary, cured the illegal acts of the police in making the arrest. The Supreme Court in Wong Sun, although not squarely holding,[31] clearly indicated that it would view an otherwise voluntary confession inadmissible in a federal court if found to be the "fruit" of an arrest without probable cause. 371 U.S. 486 n. 12.

This Court in Gatlin, supra, followed the Supreme Court's lead in Wong Sun and held that a confession (irrespective of whether or not the confession was voluntary) obtained after an arrest without probable cause was the fruit

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30/ See e.g., Dailey v United States, 261 F.2d 870 (5th Cir. 1958), cert. denied, 359 U.S. 969 (1959); Smith v United States, 104 U.S. App. D. C. 36, 254 F.2d 751, 758, cert. denied 357 U.S. 937 (1958); United States v.Walker, 197 F.2d 287 (2d Cir.), cert. denied, 344 U.S. 877 (1952).

31/ The Court did not have to decide the question since it found that under the circumstances in which the statement was made, "it is unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." 371 U.S. at 486.

of official illegality and as such inadmissible into evidence to prove the offense on which the accused stood convicted. (320 F.2d at 672).

As shown above, appellant's incriminating statement[32/] is clearly the "fruit of official illegality;" it was elicited at a time when he was illegally detained. That the admission into evidence of this incriminating statement seriously prejudiced appellant cannot be denied.[33/] Therefore, the Trial Court committed reversible error in admitting this statement into evidence and appellant's conviction must be reversed.

32/ Whether it is viewed as a full confession or an incriminating statement is immaterial for purposes of the exclusionary rule. Fahy v Connecticut, 357 U.S. 85, 86-87 (1963).

33/ It was the only evidence which linked him to the gun. See supra pp. 6-7.

II. THE INTERROGATING OFFICER'S FAILURE TO WARN APPELLANT OF HIS CONSTITUTIONAL RIGHTS TO SILENCE AND COUNSEL RENDERS HIS CONFESSION INADMISSIBLE

If the Court finds that appellant's arrest and continued detention were supported by probable cause, it then becomes necessary for the Court to determine the applicability of the Supreme Court's decision in Escobedo v Illinois[34/] to appellant's incriminating statement given in response to police questioning. It is appellant's contention that, if his arrest and continued detention were in fact supported by probable cause, the Supreme Court's holding in Escobedo requires the police officer to inform him of his absolute constitutional right to silence and of his right to counsel before any questions were asked of him. Failure on the part of the police to advise appellant of his rights renders his confession inadmissible. Assuming that Escobedo does not require, in circumstances such as these, that confessions obtained by police through questioning of uninformed persons after arrest be excluded, appellant nevertheless contends that this Court, in the exercise of its supervisory authority, and on the facts of this case, should hold that his incriminating statement was improperly received in evidence.

34/ 378 U.S. 478 (1964)

A. Escobedo v Illinois Requires the Exclusion of Incriminating Statements Given in Response to Police Questioning After Arrest Unless the Arrested Person has been Informed of his Rights

At trial or any prior proceeding, the law carefully guarantees an accused both the right to know that he cannot be compelled to make any statement and also the right to assistance of counsel if he so desires. It is incongrous that the law should guarantee him this knowledge at every judicial proceeding - indeed, should require that he receive a judicial warning without unnecessary delay after arrest - yet allow the police to keep him in ignorance of his rights to silence and to advice of counsel at the one stage when his knowledge may be most effective - between arrest and presentment.

Decisions prior to 1964 are, of course, virtually uniform in holding that the police are under no duty to inform an arrested person of his rights to silence and counsel. 35/

35/ See e.g., United States v Wilson, 264 F.2d 104 (2d Cir. 1959); Heideman v United States, 104 U.S. App. D.C. 128, 259 F.2d 943 (1958), cert. denied, 359 U.S. 959 (1959); Metoyer v United States, 102 U.S. App. D.C. 62, 250 F.2d 30 (1957); United States v Heitner, 149 F.2d 105 (2d Cir. 1945); United States v Papworth, 156 F. Supp. 842 (N.D. Tex. 1957), aff'd 256 F.2d 125 (5th Cir. 1958), cert. denied 358 U.S. 854. These cases generally rely either on Mitchell v United States, 322 U.S. 65 (1944) or Powers v United States, 223 U.S. 303 (1912) and Wilson v United States, 162, U.S. 613 (1896). (The latter two cases involved proceedings before a magistrate). State cases are collected in Inbau & Reid, Criminal Interrogation and Confessions 164 (1962). For the only two Federal cases holding that a warning is necessary see United States v Kallas, 272 Fed. 742 (W.D. Wash., 1921) and United States v Bell, 81 Fed. 830 (C.C. W.D. Tenn., 1897). Apparently, the only State which required a warning was Texas and this by statute, not decision. Texas Ann. Code, Crim. Procedure Art. 727 (enacted in 1907).

It was this incongruity that Escobedo corrected. There the Court held:

> Where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the assistance of counsel" in violation of the Sixth Amendment . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. [378 U.S. at 490-91]

The judicial decisions interpreting the scope of the Supreme Court's holding in Escobedo are by no means uniform. However, it is clear that Escobedo settles once and for all the question of whether the self-incriminating clause of the Fifth Amendment includes the right to silence in the face of police questioning.[36/] After finding that that absolute constitutional right must be preserved, Escobedo then requires that "when the process shifts from the investigating to accusatory - when it is focused on the accused and

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36/ See Kennedy v United States, 119 U.S. App. D.C. 142, 353 F.2d 462, 466 n. 8 (1965).

its purpose is to elicit a confession,"[37] the police must at a minimum inform the accused of his right to silence and to the assistance of counsel before commencing an interrogation. For it is Escobedo's concern that an accused's

> own uncounseled incriminating words may not be used against him at trial if they were elicited by purposeful police interrogation without prior warning of his right to silence and right to counsel. [38]

It is also clear that the Court predicated the right to counsel upon the right to silence guaranteed by the Fifth Amendment[39] and determined that this right is useless unless one knows he has it:

> We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continual

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37/ 378 U.S. at 492. Admittedly the Court went on to say that under the facts and circumstances before them, the accused should have been permitted to consult with his lawyer. However, it is erroneous to "limit the significance of Escobedo to recurrences of exactly the same facts and ignore the statement of general principle or pretend it isn't there." United States v Robinson, 354 F.2d 109, 117 (2d Cir. 1965) (Dissenting Opinion, Anderson, J.)

38/ Williams v United States, 120 U.S. App. D.C. 244, 345 F.2d 733, 735 (1965) (Concurring Opinion, Burger, J.)

39/ See 378 U.S. at 497 (Dissenting Opinion, White, J.).

> effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system. [378 U.S. at 490]

In his dissent, Mr. Justice White emphasized the extent of the Court's holding:

> At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel. [378 U.S. at 495]

Although this remark was directed toward the right to counsel, it is also applicable to the right to silence. Indeed, it is the existence of this constitutional absolute right to silence which gives rise to the necessity for the assistance of counsel.[40/]

40/ This rationale is the basis for this Court's holding in Kennedy v United States, supra. There the claim was made that Escobedo required the exclusion of identification evidence because the police were required to inform the accused of his right to counsel before he could be taken before the witness for identification. In rejecting this argument, this Court reasoned that even if the right to counsel had attached "it by no means follows that any constitutional right was impaired for he neither said nor did anything his counsel could have stopped had counsel been present." 353 F.2d at 464.

Finally, Escobedo holds that, once there is a constitutional right to silence,[41] it must be waived prior to police questioning. This, of couse, means that the arrested person must be made aware that the right exists[42] and in the absence of counsel, the duty rests on the police to so inform the accused. The problem then is at what point does this right attach.

It is erroneous to read Escobedo's sweeping concern with an arrested person's awareness of his right to silence as requiring the police to inform him of the right only prior to embarking upon a process of interrogations consciously designed to elicit a confession.[43] If the right exists at all as a thing of value, it exists at every stage

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41/ Appellant's argument is directed primarily to the right to be informed of the right to silence for this is the most critical right subsequent to arrest but prior to presentment.

42/ Wood v United States, 75 U.S. App. D.C. 274, 286, 128 F.2d 265, 277 (1942).

43/ Nor can the attachment of the rights to silence and counsel be made to depend on whether or not the accused sought to exercise them. For, as the Third Circuit in United States ex rel Russo v New Jersey, 351 F.2d 429, 438 (1965) pointed out, "[t]he request by Escobedo to consult with his attorney is in and of itself evidence that he was aware of his constitutional rights. Thus, it would seem that to supress a confession of one knowledgeable of his rights but who has nonetheless confessed and to admit into evidence a confession of one who might be unaware of his rights at the time of his confession would be sophistry."

of police questioning, at least subsequent to arrest, whether that questioning is an apparently casual inquiry immediately after arrest or a more organized inquisition some time later in an interrogation room. To be at all meaningful, the right to silence cannot depend upon the number of questions asked nor the motives of the police in asking them. Nor should it depend on the place and time where the interrogation takes place. At every stage of police questioning following arrest, there is a right to silence and the accused must be made promptly aware of it.[44/]

However, this Court need not decide, in order to reverse appellant's conviction, that the accused must be made aware of his rights immediately following his arrest. Moreover, appellant does not contend that the police are precluded from all questioning between arrest and presentment. Neither does he assert that the presence of counsel is always an absolute prerequisite to interrogation. Appellant does contend, however, that after he was arrested, searched, taken to the police station under custody, and confronted with evidence relating to the gun, the police were then required to

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44/ See 78 Haw. L. Rev. 142, 220 (1964); Kasimar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, printed in Criminal Justice in Our Time (1965).

inform him of his constitutional rights to silence and to counsel before interrogating him in connection with the gun.

It is clear that at the time appellant was interrogated, the process had shifted from investigatory to accusatory and the police were embarking upon a process of interrogation consciously designed to elicit a confession.[45] For at this stage, the police officers were in possession of enough information to reasonably connect appellant with the gun. Officer Johnson testified that he had noticed a "bulge" in appellant's left trouser pocket when he first approached appellant (Tr. 10, 18) and that the items taken from appellant after the arrest could not have possibly made "that big a bulge." (Tr. 35)[46] Officer Johnson testified further that during the chase, he saw appellant pause in the alley and that the gun was found "approximately in the same vicinity." (Tr. 13) Armed with this information, the police officers then turned to appellant and confronted him with the gun. Thus, there cannot be any doubt that at this point

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45/ If this isn't true, then the police did not have any probable cause to hold him.

46/ Thus, the gun seems to explain the existence of the bulge.

appellant had become an accused man and the police were embarking upon a process of interrogation consciously designed to elicit a confession. At the very least appellant was, at this stage, entitled to be informed of his rights to silence and to counsel. Failure to so inform him, renders his statements inadmissible and appellant is entitled to a new trial.

There is nothing in this record which would indicate that Detective McEwen advised appellant of his constitutional rights to silence and to counsel prior to questioning him in connection with the gun. The Supreme Court in Escobedo noted that before there can be any waiver, it must be shown that appellant "intelligently and knowingly waive[d] his privilege against self-incrimination and his right to counsel . . . ."[47/] Before there can be an effective waiver

> [t]he record must show, or there must be an allegation and evidence which

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47/ 378 U.S. at 491 n. 14.

> show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Any thing less is not a waiver. 48/

There hasn't been such a showing in this case. Therefore, appellant's incriminating statements were inadmissible and appellant is entitled to a new trial.

As noted above, the judicial decisions since Escobedo are by no means uniform. The States have been reluctant to read the case as requiring an informed waiver of the right to silence, although, California,[49/] Oregon,[50/] Rhode Island,[51/] Pennsylvania[52/] and Tennessee[53/] have held that Escobedo requires that the accused be informed of his rights prior to police interrogation. California, however, has refused to

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48/ Carnley v Cochran, 360 U.S. 506, 516 (1962); United States ex rel Russo v New Jersey, 351 F.2d 429, 440 (3rd Cir. 1965). See also Greenwell v United States, 119 U.S. App. D.C. 100, 337 F.2d 136 (1964); Queen v United States, 118 U.S. App. D.C. 262, 335 F.2d 297 (1964); Ricks v United States, 118 U.S. App. D.C. 216, 334 F.2d 964 (1964).

49/ People v Dorado, 62 Cal. 2d 338, 398 P.2d 361 (1965).

50/ State v Neely, 239 Ore. 487, 398 P.2d 482 (1965).

51/ State v Du Four, R.I. , 206 A.2d 82 (1965).

52/ Commonwealth v Negri, 419 Pa. 117, 213 A.2d 670 (1965).

53/ Campbell v State, Tenn. , 384 S.W.2d 4 (1964).

exclude threshold confessions for failure to so inform.[54] Federal courts are likewise not uniform on this question. In United States ex rel Kemp v Pate, the Northern District of Illinois squarely held that the Supreme Court's decisions "require the exclusion from evidence of any confession obtained by interrogation prior either to a constitutional warning by the interrogating officer, or, in the alternative, presentment before a magistrate where such warning is given."[55] The Fourth and Third Circuits have likewise held that Escobedo requires the police to advise an accused of his rights prior to any questions following arrest.[56] On the other hand, the Second Circuit based on a narrow reading of Escobedo, has held that a threshold confession made by an unwarned accused is not inadmissible under Escobedo.[57]

54/ People v Cotter, 46 Cal. Reptr. 622, 405 P.2d 862 (1965). This decision construes Escobedo narrowly and holds that until a "process of interrogation" has commenced, an arrested person may be kept ignorant of his rights.

55/ 240 F. Supp. 696, 707 (N.D. Ill. 1965).

56/ Miller v Warden, 338 F.2d 201 (4th Cir. 1964); United States ex rel Russo v New Jersey, 351 F.2d 429 (3rd Cir. 1965).

57/ United States v Cone _____, 354 F.2d 119 (1965).

As it has been shown above, appellant's incriminating statements are inadmissible even if this Court were to adopt the narrow view and hold that Escobedo requires the police to inform an accused of his rights only prior to embarking upon a process of interrogation consciously designed to elicit a confession. Adoption of such a view, however, would be out of harmony with the decisions of this Court which have placed renewed emphasis upon the right of an accused to be meaningfully informed of his rights to silence and to counsel.[58/]

The question of the scope of Escobedo is now pending in the Supreme Court.[59/] The point at which a warning is constitutionally required has been argued and the Court's decision may well be dispositive of this case. If this Court finds that there was probable cause for appellant's arrest and continued detention, appellant urges this Court not to decide this case until the Supreme Court has acted on the cases pending before it.

58/ Alston v United States, 120 U.S. App. D.C. 63, 348 F.2d 72 (1965); Greenwell v United States, supra.

59/ Miranda v Arizona, et al., Nos. 659-62, 584.

B. Assuming Escobedo Does Not Require the Exclusion of Confessions Obtained by Police Questioning of Uninformed Persons After Arrest, This Court Should Do So in the Exercise of its Supervisory Authority

Even assuming Escobedo does not require a warning in the circumstances of this case, this Court should, in the exercise of its supervisory authority over the administration of justice in the District of Columbia,[60/] require that an arrested person be informed of his right to silence before the police question him. This Court has recently excluded a threshold confession given by an unwarned accused on Mallory grounds,[61/] and in so doing clearly indicated the importance it attaches to a prompt caution that an arrested person has an absolute right to remain silent. If such a right exists -- whether as constitutional right or not -- any rule which allows the police to question an arrested person prior to informing him of this right "inevitably discriminates against the ignorant and inexperienced who may answer questions without any apparent coercion simply because they believe that

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60/ See Griffin v United States, 336 U.S. 704 (1949); Fisher v United States, 328 U.S. 463 (1946).

61/ Alston v United States, 120 U.S. App. D.C. 63, 348 F.2d 72 (1965).

the police have the authority or power to make them."[62]

Professor Kasimar has concisely summed up appellant's position:

> I do not claim that the State has an obligation to prevent a suspect from incriminating himself. I do contend that it must insure that the suspect is aware that he need not, and cannot be made to incriminate himself. I do not claim that the State should, or even that it can, eliminate all the subtle and personal "inequalities" which disadvantage some suspects of police interrogation more than others. I do contend that so far as it is reasonably possible the State can and should insure that the choice of the weak and the ignorant and the poor to speak or not to speak is as free and as informed as that of their more fortunately endowed brethern. [63]

This view is an extremely reasonable one and clearly in accord with the spirit, if not the letter, of the Supreme Court's decision in Escobedo. Indeed, it would remove much of the difficulty in the administration of the Escobedo rule in the District of Columbia. Furthermore, it would discourage the police from attempting to "roll back" the Escobedo

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62/ State ex rel. Russo v New Jersey, 351 F.2d 429, 438 (3rd Cir. 1965). See authorities cited therein.

63/ Kasimar, supra, note 44 at 33.

doctrine under the guise of investigation, as has been the case in England where admissibility of a confession obtained in violation of the Judge's Rules[64] is a matter of discretion with the court.[65]

Furthermore, there is no convincing evidence that requiring the police to inform an arrested person of his rights would seriously hamper police work. The FBI always gives such a warning upon arrest,[66] and there is no indication

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64/ [1964] All Eng. Reps. 237, 238:

> 2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions relating to that offense.
>
> The caution shall be in the following terms:
>
> "You are not obliged to say anything unless you wish to do so but what you say may be put in writing and put in evidence."

For earlier statements of the rule see 10 Halsbury's Laws of England, 471 (3d Ed. 1955).

65/ See Inbau, Restrictions in the Law of Interrogation and Confessions, 52 N.W. Univ. L. Rev. 77, 85 (1957).

66/ See Hoover, Civil Liberties and Law Enforcement: The Role of The FBI, 37 Iowa L. Rev. 175, 182 (1952).

that this has shut off the flow of confessions obtained by its agents.[67] Furthermore, Texas[68] and Canada[69] exclude confessions not preceded by a warning of rights, and appellant has discovered no evidence that law enforcement has been impaired in those jurisdictions. India, of course, goes to the extreme of disallowing all confessions made to a police officer[70] and even here there is no indication that her system of law enforcement is breaking down. The Uniform Code of Military Justice requires that any accused or suspected person must be informed of his right to silence before any questions are asked, and expressly makes any statement obtained in violation thereof inadmissible.[71] The administration of military justice has not been impaired by this

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67/ See e.g., Jackson v United States, 119 U.S. App. D.C. 100, 337 F.2d 136 (1964), cert. denied 380 U.S. 935 (1965); Greenwell v United States, 119 U.S. App. D.C. 43, 336 F.2d 962 (1964); United States v Ruehrup, 333 F.2d 641 (7th Cir.), cert denied, 379 U.S. 903 (1964).

68/ Texas Ann. Code Crim. Proc., Art. 727.

69/ Gach v R. [1943] Can. Sup. Ct. Reps. 250, 79, Can. Crim. Cas. 221,225.

70/ India Evidence Act, 1872 §§25, 26.

71/ Uniform Code of Military Justice, Art. 31, 10 U.S.C. §831.

requirement and, in fact, confessions are commonplace in the armed services. Finally, appellant is informed that the Metropolitan Police are now instructed to warn an arrested person before questioning begins. Thus, such a rule should have no practical effect upon the efficiency of the police force.

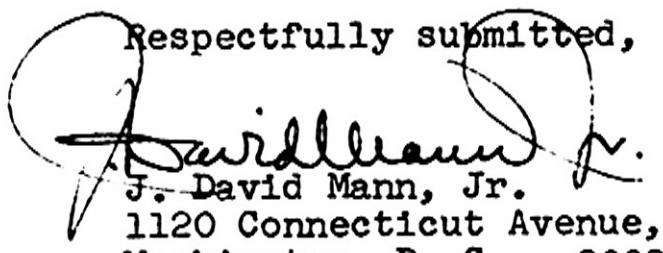
In short, the advantages of a rule requiring that arrested persons be made aware of their rights upon arrest far outweigh the practical disadvantages to the efficient operation of the police force.[72/] In any event, the practice of agents of the government keeping a person in ignorance of his rights in hopes that through this ignorance he will incriminate himself in response to a question which apparently commands an answer with all the authority of the State is a dangerous one, totally incompatible with the concept of equal justice.

72/ For a well reasoned answer to the literature suggesting that the policy of the Bill of Rights is today too inconvenient to be tolerated, see Sutherland, Crime and Confession. 79 Harv. L. Rev. 21 (1965).

CONCLUSION

For the above reasons appellant submits that the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted,



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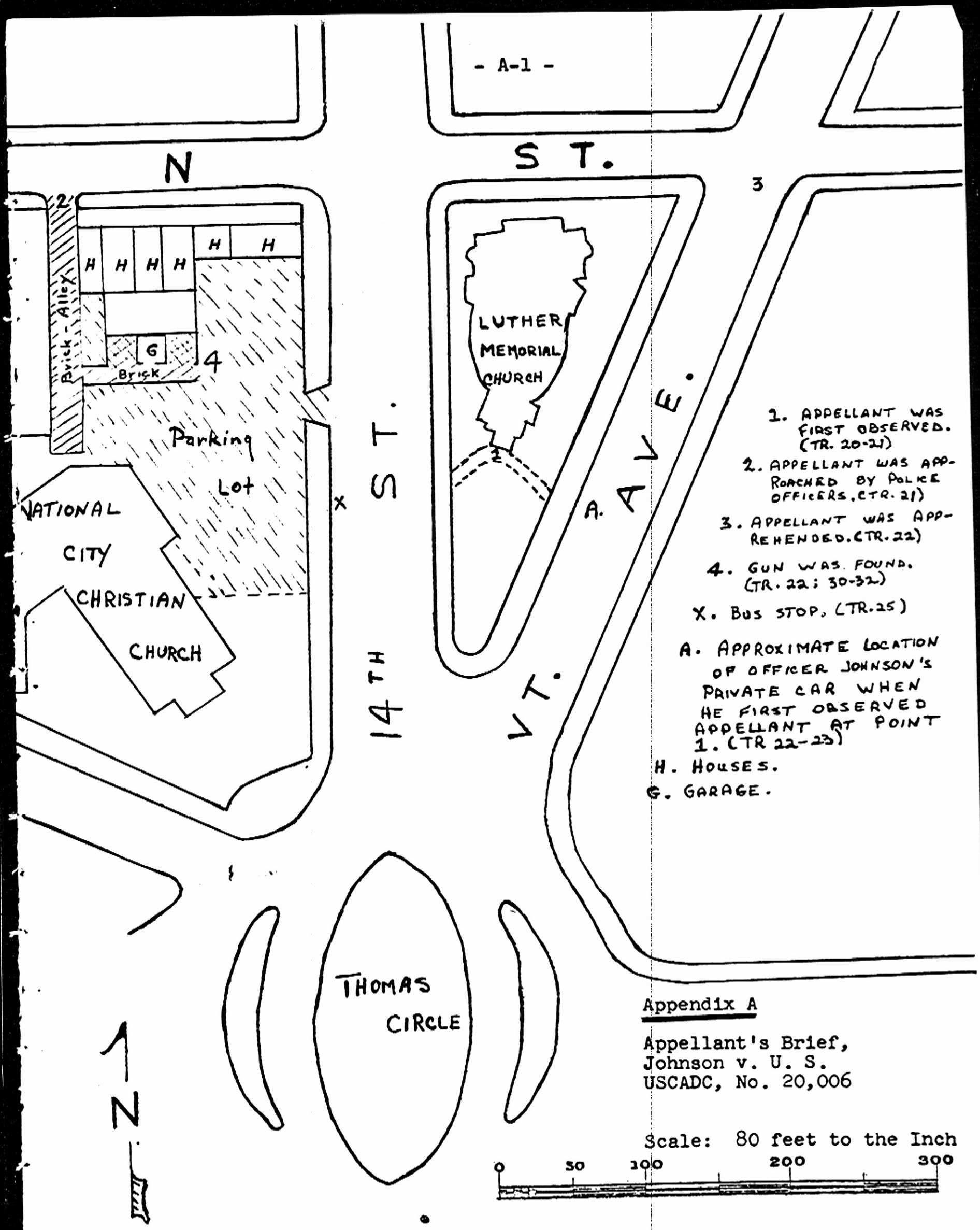

Appendix A

Appellant's Brief,
Johnson v. U. S.
USCADC, No. 20,006

Scale: 80 feet to the Inch

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,006

HENRY JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

Cr. No. 888-65

QUESTIONS PRESENTED

1) Were a voluntary threshold statement and a gun abandoned by appellant, obtained after appellant committed an act of disorderly conduct in the presence of police officers, fruits of an illegal arrest?

2) May appellant for the first time on appeal challenge the admissibility of a voluntary threshold statement on the grounds that he had not been forewarned by the arresting police of his constitutional rights, where the record is silent on whether any such warning was or was not given? If so, was it plain error to admit this statement into evidence as violating the teaching of existing case law?

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,006

HENRY JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Based on a one-count indictment filed July 3, 1965 appellant was on January 10, 1966 convicted by a jury of carrying a concealed pistol without a license in violation of 22 D.C. Code § 3204. Thereafter the government filed an information alleging that appellant had pled guilty in 1959 to two counts of the felony of unauthorized use of a vehicle (22 D.C. Code § 2204) and in 1961 had been convicted of the same felony. Appellant was subsequently sentenced to prison for a term of from one to three years and now appeals.

It was about 11:50 at night (Tr. 9). Officers James T. Johnson and his partner Officer Grabner of the Metropolitan Police Department were working as part of the tactical force, canine corps, on July 8, 1965 (Tr. 8, 9). Accordingly they were dressed in mufti and drove in a private vehicle (Tr. 8, 27). While cruising, Officer Johnson's attention was drawn to appellant when he broke and ran from the vestibule doorway of the Luther Memorial Church bounded by a triangle of streets: N Street, 14th Street and Vermont Avenue, N.W. (Tr. 9, 10, 17, 18). The running figure was clothed in a long sleeved black velvet shirt, black pants and black shoes (Tr. 26, 64). Appellant sprinted across some 50 feet of churchyard property to the public sidewalk, crossed the road, and melted around the corner into the 1400 block of N St. (Tr. 10, 17).

In order to head off appellant, Officer Johnson drove through an alley in the rear of the 1400 block of N Street, stopped the vehicle where it intersected with N Street and alighted just as appellant was approaching the car (Tr. 10, 21, 24, 27, 105). Identifying himself as a policeman, Officer Johnson displayed his police badge and official police photograph, and told appellant he wished to speak to him (Tr. 10, 12). Appellant was not so inclined. He said "Oh, no, M.... F...." and began to back away (Tr. 10, 12, 13). But two other plain clothed officers, summonsed over the police radio, were approaching from behind (Tr. 10). Appellant then picked a line of flight in the direction of Officer Johnson and his partner, and, barrelling between them, fled with Olympian speed (Tr. 10, 21). Officer Johnson, one of two pursuers on foot, quickly lost sight of appellant, but not before seeing him pause "in slight hesitation" after racing south down the alley (Tr. 11, 13, 22, 29). He did not, however, see appellant throw anything away (Tr. 29). Unfortunately for appellant, he was rapidly apprehended by the other officers some two blocks away (Tr. 11, 32).

The physical evidence supporting appellant's instant conviction was a .32 cal automatic pistol, loaded with two

rounds in the magazine (Tr. 14, 15).[1] At their first confrontation, Officer Johnson had observed a "very noticeable" bulge in appellant's left pants pocket, and appellant had slapped his left hand on this pocket as he called the officer the obscene name (Tr. 10, 27, 28, 36). The gun was recovered by Officer Johnson, who, later retracing the steps of the chase, spied it lying about one foot to the side of the alley near the point where appellant hesitated during his flight (Tr. 13, 30, 31). Detective Paul L. McEwen was not able to remove any latent fingerprints from the gun (Tr. 34-36, 45, 46).

Appellant was searched at the scene of his arrest, and, as indicated, no gun was recovered from his person (Tr. 18, 33), but he did possess, despite Washington's July climate, a pair of black leather gloves (Tr. 18, 52). He was not wearing them, at least not at the time of the first confrontation with Officer Johnson (Tr. 28).

Appellant was turned over by the tactical squad officers to Detective McEwen of the Second Precinct to be charged with disorderly conduct (Tr. 39, 40, 60). They arrived at the precinct station at about 12:15, approximately 25 minutes after appellant was first seen by Officer Johnson (Tr. 40).[2] Almost immediately Detective McEwen learned through the police radio that a gun had been recovered

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[1] Before any testimony was introduced appellant's trial counsel unsuccessfully moved to suppress "evidence which was seized and the pistol" (Tr. 7). A pretrial motion to suppress had been denied by Judge Edward M. Curran after a full hearing (Tr. 7, 42, 43). Counsel twice renewed his objection at trial. Firstly, he opposed the government's introduction into evidence of an oral admission, discussed *infra*, on the limited ground that there was an unlawful arrest (Tr. 41, 42). The trial judge ruled in favor of the government, saying there was "probable cause under all the circumstances as I have heard them." (Tr. 43). Secondly, counsel opposed admission into evidence of the gun, again without success (Tr. 62).

[2] Appellant testified at trial. After detailing his activities prior to coming to the scene of the crime and after explaining why he was there, he placed himself in the vicinity of the church at about 10:30 to 10:45, more than an hour before the government's testimony placed him there (Tr. 9, 39, 101).

by Officer Johnson (Tr. 40, 41).[3] Two minutes after arrival at the precinct the detective asked appellant about the gun (Tr. 40, 51), and a simple oral admission followed. Appellant explained at the precinct, according to Detective McEwen, that he did have a gun, claiming that he discovered it lying on the ground, picked it up, put it in the waistband of his pants and started walking towards 14th Street where "for no reason at all" the officers started chasing him (Tr. 43, 52). During the chase, he dropped it (Tr. 44, 52). At the precinct he identified the recovered gun as the one he had droped (Tr. 44).

Appellant's admission was corroborated by the contemporaneous notes taken by Detective McEwen and was verified by the testimony of Officer Jack D. Parr who heard appellant's statements (Tr. 187, 194, 195).

Appellant, testifying on his own behalf, admitted that while on his way to the bus stop on the night in question he crossed the Luther Memorial Church property, traversing the walkway which passes the church door (Tr. 63, 65, 91, 92); he admitted that shortly thereafter he walked down N Street, a one-way street, allegedly to catch a cab which had proceeded down it the wrong way and had halted beyond the mouth of the alley (Tr. 63, 65, 66); he admitted walking towards two men who came out of the alley and waited for him, but contended he did not see their car (Tr. 67, 68, 105); he adimtted being called over by one of the men who said "Hey, I want to talk to you" (Tr. 68, 105); he admitted first backing up, then seeing two more men approaching him from behind, who, like the first two, were dressed in civilian clothes; he admitted running between the first two men into the alley, ostensibly because he thought they were going to rob him. (Tr. 66-68, 106-108); he admitted taking an escape route through the alley which passed the point where the gun was found (Tr. 13, 68, 69, 108-110); and finally, he admitted being caught and searched at the point established by the government (Tr. 69).

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[3] A check of the Church revealed no evidence of a break-in (Tr. 24).

Appellant put into factual contention the vital issues of the case by denying that (1) any of the men identified themselves as police officers or displayed any identification (Tr. 105-107); (2) he swore at any policeman (Tr. 106); he paused or hesitated while running in the alley (Tr. 112); (3) he dropped anything while running from the policemen (Tr. 112); (4) he ever had a pistol in his possession that night (Tr. 70, 119); (5) he confessed to having a pistol, or even was asked by Detective McEwen about a gun or was shown a gun at the precinct (Tr. 71, 119); and finally (6) he denied having a pair of gloves that night (Tr. 64, 123), although he conceded that the Police Property Book reflected that a pair of gloves had been taken from him and he acknowledged as genuine his signature on this book in receipt of the return of a pair of gloves (Tr. 122-123).

On direct testimony appellant volunteered that he had "previous convictions" for the felony of unauthorized use of a motor vehicle (Tr. 69), and admitted on cross-examination that they had occurred in 1959 and 1961 (Tr. 72).

Appellant offered the testimony of his mother (Tr. 130) and a friend (Tr. 160) concerning his activities earlier on the evening in question, and the testimony of his girl friend (Tr. 139) and his employer (Tr. 152) who testified as character witnesses attesting to his reputation for truthfulness and orderliness.

SUMMARY OF ARGUMENT AND ARGUMENT

I. Apellant's arrest for disorderly conduct was valid, and the gun abandoned by appellant after his disorderly act, and his post arrest admission were properly admitted into evidence.

(Tr. 7-10, 12-13, 17-18, 26, 42-43, 60, 62, 64, 68, 105)

Appellant's motion to suppress the tangible evidence and the oral admission used against him at trial was de-

nied following a full pre-trial hearing (Tr. 7, 42, 43). The motion was reasserted at trial on the same grounds, *i.e.*, that this evidence was the product of an illegal arrest. (Tr. 7) It was twice renewed during trial but was denied on each occasion (Tr. 43, 62). The trial judge's finding on the legality of appellant's arrest, based on the facts before him, was that "there was probable cause under all the circumstances as I have heard them" (Tr. 43). There is ample evidence to support the trial judge's factual finding and to support the exercise of his discretion. Appellant's arrest after cursing Officer Johnson was patently legal and appellant's contention should again be rejected as it previously has been by two triers of fact.

The officers had several good reasons for questioning appellant. He had been seen adjacent to the alcove leading to the doorway of a church some fifty feet away from public property (Tr. 9, 10, 17, 18). It was 11:50 on a Thursday night, well beyond normal church hours (Tr. 9). He was dressed fully in black, as if to blend into the night (Tr. 26, 64). He started running at a time that coincided with the approach of two men in a private car (Tr. 8, 9). He ran away from the direction of this automobile (Tr. 10, 17).

The officers, observing the direction of appellant's flight, took a short cut in order to come out ahead of him (Tr. 10). Appellant admits that as he came down N Street he approached the officers who were "waiting for me" (Tr. 105). Also by his own admission one of the officers called out, indicating that he merely wanted to speak to appellant (Tr. 68, 105). Thus the circumstances compelled inquiry, and reasonable police action brought about this confrontation. Such an attempt to "approach, confront and interrogate" has long been sanctioned by this Court. See *(John A.) Bell* v. *United States*, 108 U.S. App. D.C. 169, 171, 280 F.2d 717, 719 (1960), and cases cited therein. But upon Officer Johnson's identifying himself, both orally and by displaying his full police credentials, apellant back off, saying, "Oh, no" and calling Offi-

cer Johnson an obscene name (Tr. 10, 12, 13).[4] Appellant thereby committed an act of disorderly conduct[5] in the presence of the officer.

It is uncontestable that Officer Johnson had probable cause to arrest appellant immediately upon his utterance of the obscenity.[6] Therefore, the subsequent chase and arrest[7] of appellant were lawful and there exists no poisoned tree bearing poisoned fruit.[8] [9]

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[4] It is well settled that evidence on appeal must be viewed in the light most favorable to the government, *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

[5] 22 D.C. Code § 1107 provides in part: "It shall not be lawful for any person . . . to insult or make rude or obscene gestures or comments or observations on persons passing by . . .; it shall not be lawful for any person . . . to curse, swear, or make use of any profane language or indecent or obscene words . . . in any street . . . ."

[6] 4 D.C. Code § 140 empowers and authorizes police officers to make immediate arrests without a warrant where any breach of the peace or offense directly prohibited by any law or ordinance in force in the District of Columbia is committed in their presence.

[7] Detective McEwen testified that it was his understanding when he took appellant to the Second Precinct that he was to be charged with disorderly conduct (Tr. 60). In fact appellant was booked and charged accordingly. See transcript from the first trial (mistrial), p. 75.

[8] In addition, Officer Johnson, at the moment he saw appellant fleeing from the church property, 50 feet from public space, had probable cause to believe that appellant had committed in his presence the misdemeanor of unlawful entry as to the church grounds (22 D.C. Code § 3102). Furthermore, when the details of the first observation of appellant are added to the fact that appellant, when confronted by the officers who identified themselves, reacted with an obscenity, broke away from their company and sped away in headlong flight, there was, it is submitted, sufficient probable cause to charge appellant with attempted unlawful entry into the church building. This probable cause was strengthened by the later recovery from appellant of a pair of gloves, which, under the circumstances, could be considered instrumentalities of a crime.

[9] Because appellee believes that appellant's arrest was clearly lawful, it is unnecessary to enter into a discussion of the law of abandonment and the related question of whether the finding of the gun was the fruit of any arrest.

II. Having declined in the trial court to raise and explore the issue of whether appellant was warned of his constitutional rights before making his voluntary threshold statement, appellant is barred from raising the issue for the first time on appeal; in any event, even assuming appellant was not warned, existing case law sanctions the introduction into evidence of this voluntary threshold statement.

(Tr. 7, 41, 42)

As a second thrust at the legality of his conviction, appellant urges reversal because of alleged police failure to warn him of his right to silence and of his right to counsel. No such objection was raised at trial; the oral admission was only contested on the narrow ground that it was the product of an illegal arrest (Tr. 7, 41, 42). No hearing was held to determine whether or not appellant was informed of his rights and appellant recognizes this deficiency in the record (Br. p. 5). This Court has held that under circumstances where the record did not show whether the prosecution or the defense sought to ventilate the issue of a defendant being warned of his right to remain silent, it "cannot reverse". *Pea* v. *United States*, 116 U.S. App. D.C. 410, 324 F.2d 442 (1963), *vacated on other grounds*, 378 U.S. 422 (1964). See also, *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965, *en banc*), *cert. denied*, 383 U.S. 907 (1966) (failure to specify *Escobedo* issue as grounds for objection forecloses review). This rule should be applied to the instant case.

Furthermore, having elected not to object to the statement at trial, appellant must assert that its introduction into evidence was plain error under Rule 52(b), F.R. Crim. P. such as to compel reversal. This Court and others have shown their firm reluctance in the field of admissions to reverse under these conditions. *Coor* v. *United States*, 119 U.S. App. D.C. 259, 340 F.2d 784 (1964); *United States* v. *Indiviglio*, *supra*.

Significantly, it should be noted that appellant is not a stranger to the ways of the law. As a twice-convicted

felon he was, presumably, twice fully warned of his rights by the committing magistrates, in addition to whatever advice he may have received from his lawyers.[10]

It is clear, however, that existing case law sanctions the use of the challenged statements.[11] Appellant's reliance on *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) as authority for excluding threshold statements is not convincing, for the precision used by the Supreme Court to limit its finding clearly shows that the case held only that a confession is inadmissible where

> the police carry out a process of interrogations . . . that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . . 378 U.S. at 491; See *Johnson & Cassidy* v. *New Jersey*, *supra*, slip op. at 13-14.

Here, in sharp contrast to the extended interrogation in *Escobedo* where affirmative police action prevented the defendant's lawyer from consulting with his client after a request had been made, Detective McEwen simply inquired about the gun immediately upon arrival at the precinct when the detective first became aware that a gun had been recovered.[12] He received, within two minutes of their arrival at the precinct, a casual explanation by appellant of where he got the gun and what became of it.

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[10] As the Supreme Court has observed, it is "good professional judgment" to advise a criminal client not to talk to the police. *Miranda* v. *Arizona*, No. 759 Oct. Term 1965, 34 U.S.L. 4521 (U.S. June 13, 1966), slip op. at 42.

[11] The recent Supreme Court decision of *Miranda* v. *Arizona*, *supra*, which might otherwise have a bearing upon the instant case, has been made inapplicable to all trials commencing prior to June 22, 1966. *Johnson & Cassidy* v. *New Jersey*, No. 762 Oct. Term 1965, 34 U.S.L. Week 4592 (U.S. June 20, 1966).

[12] At this point, of course, appellant was under arrest only for disorderly conduct.

The police in every case need not advise an arrested suspect of his rights and not even *Escobedo* can be read that broadly. See *Wilson* v. *United States*, 162 U.S. 613, 623 (1896); *(John W.) Jackson* v. *United States*, 119 U.S. App. D.C. 100, 104, 337 F.2d 136, 140 (1964), *cert. denied*, 380 U.S. 935 (1965). The Court of Appeals in the Second Circuit, *en banc*, held a threshold confession admissible although the defendant had not been advised of his right to remain silent. *United States* v. *Cone*, 354 F.2d 119 (2nd Cir. 1965, *en banc*). This Court in *dictum* has suggested the same result. *Kennedy* v. *United States*, —— U.S. App. D.C. ——, 353 F.2d 462, 464-66 (1965); *cf. United States* v. *Robinson*, 354 F.2d 109 (2nd Cir. 1965 *en banc*) (Statement made at police station after arrest on the street held admissible despite failure to warn defendant of right to silence). See also *Long* v. *United States*, 119 U.S. App. D.C. 209, 338 F.2d 549 (1964). Appellant's statement was properly received in evidence.

CONCLUSION

Wherefore, it is submitted that the judgment of the District Court should be affirmed.

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